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Intrusion upon seclusion

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asks whether the tort naturally merits exemplary damages

In *C v Holland* [2012] NZHC 2155, the High Court found that New Zealand law recognised an actionable tort of intrusion upon seclusion with the elements: (a) an intentional and unauthorised intrusion (b) into seclusion (c) involving infringement of a reasonable expectation of privacy (d) that is highly offensive to a reasonable person. Exemplary damages are awarded to punish and deter outrageous wrongdoing rather than to compensate the plaintiff, and are available only in cases of advertent wrongdoing (*Couch v Attorney-General* [2010] NZSC 27). At first glance, the tort of intrusion upon seclusion appears almost custom-made for exemplary damages, since it requires "highly offensive" wrongdoing that is intentional. This note uses *C v Holland* to explore whether the tort of intrusion upon seclusion really is a good match for exemplary damages.

C v HOLLAND

Holland invaded C's privacy by videoing her while she was showering. C was showering in the bathroom of a house owned by Holland and by C's boyfriend, where Holland had hidden a recording device in a roof cavity. C and her boyfriend discovered the recordings and complained to police. Holland was charged under s 216H of the Crimes Act 1961 (making an intimate visual recording) and after entering a guilty plea he was convicted, ordered to pay $1,000 in reparation for emotional harm, and discharged without any additional penalty.

C brought a civil claim against Holland, arguing that the Court should extend the principles in *Hosking v Runting* [2005] 1 NZLR 1 (CA), (2004) 7 RNZ 301, where the Court of Appeal recognised a tort for invasion of privacy involving publication of private facts, and recognise a tort of intrusion upon seclusion. Such a tort is a feature of the law of the United States (*Restatement (Second) of Torts* (1977) at § 652B) and has been recently recognised in Canada (*Jones v Tsige* 2012 ONCA 32.) The High Court noted at [64] that privacy is linked to personal autonomy and at [67] stated that privacy's normative value could not seriously be doubted. Whata J considered that recognition of a tort of intrusion upon seclusion was an appropriate expansion of the common law, and found that New Zealand law recognised such a tort, with the elements as set out above. As the High Court concluded, these elements are clearly met on the facts of *C v Holland*. The question of damages was left for a later hearing.

"OUTRAGEOUS"?

For a defendant to have committed the tort of intrusion upon seclusion, the intrusion upon the plaintiff's seclusion must be more than merely inconvenient or offensive, it must be "highly offensive." For a court to award exemplary damages, a defendant's conduct must be so outrageous that it demands a response over and above an award of compensatory damages: an additional award of damages to punish the defendant and deter the kind of behaviour the defendant engaged in. So, what is the difference between these two thresholds? The level of wrongdoing required for conduct to qualify as "outrageous" is clearly higher than "highly offensive"; it is conceivable to have a highly offensive intrusion into seclusion that is not "outrageous", but all "outrageous" intrusions will surely qualify as "highly offensive." While we might be able to articulate that there is a difference between the two thresholds in the abstract, it may prove difficult to predict whether a particular intrusion upon seclusion is "outrageous" or merely "highly offensive."

The facts of the Canadian case *Jones v Tsige* provide an example of intrusion upon seclusion where exemplary damage were not awarded. Jones and Tsige worked at different branches of the same bank. Tsige, who was in a relationship with Jones' former husband, used her position as a bank employee to access Jones' banking information at least 174 times over a period of four years. The Court of Appeal for Ontario thought that the case did not exhibit any exceptional quality calling for exemplary damages. The plaintiff had sought compensatory damages of C$70, 000 and exemplary damages of C$20, 000. The Court awarded damages of C$10, 000, in part because Jones had suffered no public embarrassment or harm to her health, welfare, social, business or financial position.

I suggest that the defendant's conduct in *C v Holland* is more likely to be considered outrageous — though it is by no means certain that Holland's conduct is offensive enough to justify exemplary damages. Holland's intrusion was into a private space — the bathroom — that C could reasonably expect no one to intrude upon, where Tsige accessed information that other bank employees could legitimately access. Furthermore, there is something especially egregious about making an visual recording of someone showering without their knowledge or consent — as opposed to, for example, making a covert recording of a person sitting fully clothed in their living room. Parliament has recognised this by creating the offence of making an intimate visual recording. That brings us to the next point of discussion — the relationship between exemplary damages and the criminal law.

The criminal and civil law overlap in function. Exemplary damages and sentences for criminal offending both punish and deter. Compensatory damages and sentences of reparation both compensate. Not all intrusions upon seclusion will also qualify as criminal conduct but some, including *C v Holland*, will. This raises the question as to how exemplary damages for intrusion upon seclusion could operate given that the criminal law might already have addressed, or may address in the future, the tortious conduct in question.

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PUNISHMENT AND DETERRENCE

The Court of Appeal considered the first overlap in *Daniels v Thompson* [1998] 3 NZLR 22. In that case, a majority found that the civil law should always defer to the criminal law in matters of punishment and deterrence — to do otherwise could result in double punishment. Thus, where a party has been convicted and criminal sanctions have been applied, exemplary damages should not be available. Civil proceedings should be stayed if there is a possibility of a criminal prosecution, and only go ahead if it is clear that there will be no prosecution. Finally, in cases where a person has been acquitted of criminal charges relating to certain acts, there should be no award of exemplary damages.

In a clear rejection of *Daniels v Thompson*, Parliament amended the accident compensation legislation to state that a court can make an award of exemplary damages even though a defendant has been charged with or acquitted of a criminal offence, or has not been charged with such an offence. In addition, if a defendant has already been penalised for its conduct, the court may take this into account (Accident Compensation Act 2001, s 319.) However, this only applies to victims of personal injury covered by the ACC scheme. In a case like *C v Holland*, where the plaintiff is the victim of a criminal offence but has no covered injury under the ACC scheme, the High Court is arguably bound to apply *Daniels v Thompson* and decline to award exemplary damages, regardless of the outrageousness of the defendant's conduct.

This significantly limits the potential for successful claims for exemplary damages in cases of intrusion upon seclusion. Some of the most outrageous intrusions upon seclusion may well already be caught by the criminal law. This might create a disincentive for victims to report such conduct to police, so as to avoid prejudicing a civil claim for exemplary damages — an undesirable outcome. That, plus the anomaly of *Daniels v Thompson* applying to some victims of crime and not others, might cause Parliament — or perhaps the Court of Appeal, if it gets the opportunity — to do away with *Daniels v Thompson* for all cases of exemplary damages. *C v Holland*, or a case like it, could well be the catalyst for such a development.

Suppose that *Daniels v Thompson* does not apply, and the court hearing the case is satisfied that Holland's behaviour was outrageous. The court hearing the case is then put in the unenviable position of second-guessing in a civil case the sentence applied in a criminal proceeding while avoiding this kind of situation is one of the reasons the majority in *Daniels v Thompson* decided the case the way that it did. It does seem possible that a court might conclude that the combination of the $1, 000 reparation and conviction were not sufficient to punish Holland's behaviour, deter others from doing the same, and show society's disapproval of covertly recording C while she was showering. If so, an award of exemplary damages would mean Holland's conduct received a fuller response.

COMPENSATION

Although it is made in the context of criminal sentencing, the primary purpose of an order of reparation is compensation (*Police v Ferrier* HC Auckland CRI 2003-404-00195, 18 November 2003). Unlike civil awards of compensatory damages, reparation is subject to an important limiting factor: the financial capacity of the offender. The usual presumption in favour of reparation is lifted if an award would result in undue hardship for the offender (Sentencing Act 2002, s 12(1)). In *R v Bailey* CA306/03, 10 May 2004, the Court of Appeal stated at [25] that reparation "must be set at a level which makes it realistic given the financial circumstances of the offender". A sentence of reparation does not, however, affect the right of the victim to pursue full compensation by recovering additional damages by civil proceedings (s 38(2)).

Damages for intrusion upon seclusion and reparation for emotional harm both compensate slightly different intangible losses. The High Court may consider that the $1,000 that Holland was ordered to pay C is also sufficient compensation for the breach of privacy; or, the High Court may consider the $1,000 inadequate and award an additional amount of compensatory damages. Additional damages, whether compensatory or exemplary, may be futile if Holland does not have the ability to pay — which may well be the case if the reparation was set at $1,000 because of his financial capacity. This provides a further limiting factor on potential claims for exemplary damages for intrusion upon seclusion: finding a defendant with the ability to pay. The search for deeper pockets naturally leads to the question of vicarious liability.

One can imagine a variation on the facts of *C v Holland* where the defendant did not own the home, but was a building superintendent hired to maintain the building, or, a variation on the facts of *Jones v Tsige* where a government department is substituted for the bank. Would the employer, or the Crown, be vicarious liable? With respect to vicarious liability for compensatory damages, there may be room to argue that an intrusion upon seclusion falls outside the scope of employment and accordingly there is no liability. Vicarious liability for exemplary damages, which would mean punishing the principal for the wrongdoing of the agent, seems unlikely (although *S v Attorney General* [2003] 3 NZLR 450 (CA) at [93] and *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA) at [153] suggest vicarious liability for exemplary damages might be appropriate in extraordinary circumstances.)

CONCLUSION

At first glance, the tort of intrusion upon seclusion appears a promising candidate for exemplary damages. Two difficult hurdles have to be jumped before an award of exemplary damages can be made: the wrongdoing must be (i) advertent and (ii) outrageous. These correspond almost perfectly with elements of the tort. However, upon closer examination, major difficulties arise. Although it is clear that not all "highly offensive" conduct is "outrageous" enough for exemplary damages, further elucidation of the distinction is difficult. *C v Holland* potentially re-opens the nasty wound of *Daniels v Thompson*, which, unless overturned, limits the potential for successful claims for exemplary damages for intrusion upon seclusion. A further limit on such successful claims is finding a defendant with deep pockets — which in turn raises difficult questions of vicarious liability. Intrusion upon seclusion and exemplary damages are not a match made in heaven after all. ❐